

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH TYRONE CUMMINGS,

Defendant-Appellant.

UNPUBLISHED
February 24, 2004

No. 244035
Genesee Circuit Court
LC No. 2002-009632-FC

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of murder in the first degree, MCL 750.316, and criminal sexual conduct in the first degree, MCL 750.520b. He was sentenced to the mandatory term of life in prison without parole on the murder conviction and to thirty-nine to sixty years in prison on the CSC conviction. He now appeals and we affirm in part and vacate in part.

It is undisputed that defendant killed the victim, Brenda Millender, by strangling her to death. Defendant maintains, however, that he did not premeditate the killing and that the killing did not occur during the commission of a felony, specifically criminal sexual conduct, because he did not engage in sexual intercourse with the victim until after she was already dead. Thus, defendant's theory of the case was that he was only guilty of second-degree murder. The prosecution theory is that defendant lured the victim into an abandoned house with a promise of giving her drugs in exchange for sex, then proceeded to sexually assault and kill her.

Defendant first argues that the trial court erred in allowing the prosecutor to introduce evidence of other bad acts. We disagree. Before trial, the prosecutor moved to be allowed to introduce evidence of defendant's involvement in a separate murder and two separate cases of CSC. The prosecutor argued the similarities in the crimes was relevant to showing defendant's guilt in the case at bar. Like the trial court, we agree with the prosecutor.

In *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), the Supreme Court reaffirmed the approach to admission of other acts evidence previously adopted in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). Under this approach, a four-prong test is applied: (1) the prosecutor must offer the evidence to show something other than character or propensity to commit a crime, (2) the evidence must be relevant to some issue of consequence in the trial, (3) there must be a determination whether the danger of undue prejudice

substantially outweighs the probative value of the evidence and (4) the trial court may, upon request, provide a limiting instruction.

Although defendant admitted killing the victim in this case, he contested a very significant issue: whether the sexual penetration occurred before or after the victim's death. This fact was of consequence to both the determination whether defendant was guilty of CSC and, by extension, whether he was guilty of murder under the felony-murder theory. In fact, while the medical examiner was able to establish the cause of death as manual strangulation, and she testified that there was blood present in the victim's vaginal area that was not there naturally, she did not observe any trauma to the victim's vagina which would explain the presence of the blood. Nor did the medical examiner offer an opinion regarding whether there had been a sexual penetration before the victim died.

Turning to the other acts evidence, one of the rape victims, SS, testified that defendant approached her on the street, offered her drugs in exchange for sex, she agreed and they went into an abandoned house. Once in the house, instead of giving SS the drugs, defendant attacked her, strangling her while engaging in sexual intercourse. SS further testified that she had been starting to pass out, but did not, and that defendant let her up after he completed the sex act and she was able to flee the building.

With respect to the other rape, the officer who interrogated defendant, Sgt. Al Barron, testified that defendant made a statement regarding the rape of LD in which he stated that he got her to accompany him into a house to use drugs, and once inside, instead of giving her drugs he forced her to engage in sex while his hands were around her throat. After completing the sex act, defendant let her go.

As for the other murder, Sgt. Barron testified that defendant admitted to killing Helena Fails. Defendant told Barron that he and Fails had done drugs together and he then forced Fails to engage in sex with him. According to defendant, a "tussle" ensued when he tried to force Fails to submit to sex and that he must have broken her neck during the tussle. But according to the medical examiner, who also performed the autopsy on Fails, the cause of death in the Fails case was also manual strangulation, not a broken neck.

We are satisfied that the *VanderVliet* requirements for admission of the other acts evidence were satisfied in the case at bar. First, the evidence was offered not to show defendant's character or propensity for crime, but to show that defendant had forced the victim to engage in sexual intercourse while she was still alive, not that he had killed her first and then defiled her corpse. Second, the evidence was thus relevant to one of the primary questions in this case, whether a CSC occurred.

Turning to the third factor, we do not believe that the danger of undue prejudice substantially outweighs the probative value of the evidence. Defendant has essentially admitted all of the material facts of this case, with two crucial exceptions: when the sexual penetration occurred and whether he premeditated the killing. Defendant's statement to Sgt. Barron indicated that he and the victim tussled over his drugs, that he choked her during that struggle, apparently causing death, and he then removed her clothes and engaged in intercourse. Defendant gave a similar version of events at trial. With respect to the rape cases, he admitted to engaging in sex for drugs, but denied that he forced any of the women to engage in sex. Thus,

the evidence of the other acts differed from defendant's version of events in only two significant aspects: whether the sexual penetration was forcible and whether it occurred before or after death. But this is precisely the issue upon which the evidence is highly probative by showing a common plan or method, particularly the two rape cases. In both cases, according to the victims, defendant strangled them while engaging in nonconsensual intercourse. As for the other murder case, defendant admitted to Sgt. Barron he forced Fails to engage in sex, though maintaining that he unintentionally broke her neck during the struggle. But once again the actual cause of death was also strangulation. Accordingly, the jury could conclude from this evidence that in each of the cases defendant strangled his victims during forcible intercourse, resulting in death in two of the cases. This evidence would reasonably allow the jury to conclude that, in the present case, defendant was forcing the victim to engage in intercourse during the strangulation. That is, he forced her to engage in intercourse while she was still alive and, therefore, a CSC occurred.

In short, the evidence was not unduly prejudicial in light of what defendant admitted he did do with respect to the victim. The evidence, however, was highly probative on the issue of when intercourse occurred. Accordingly, we are satisfied that the third prong of *VanderVliet* is satisfied in the case at bar.

Finally, as for the fourth prong, the trial court did give a limiting instruction to the jury on the use of the other acts evidence and defendant does not argue that this instruction was erroneous or that the trial court improperly denied a requested instruction that differed from the one given.

For the above reasons, we conclude that the trial court properly admitted the other acts evidence.

Defendant's other argument on appeal is that his conviction for CSC constitutes double jeopardy because the CSC charge was the predicate felony for the felony-murder charge. In *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981), the Supreme Court held that convicting someone of both felony murder and the underlying felony which serves as the predicate felony for the murder conviction constitutes double jeopardy. The case at bar is somewhat different in that defendant's murder conviction was based on both a premeditated murder and a felony-murder theory. It is clear from the jury verdict that the jury concluded that defendant was guilty of murder under both theories.

Thus, the question becomes whether, because one of those theories was a felony-murder theory, the CSC conviction should be vacated under *Wilder* or if, because one of the theories was premeditated murder, the CSC conviction may stand because conviction for both premeditated murder and a contemporaneous other felony does not constitute double jeopardy. While both arguments have their merit, we conclude that the appropriate conclusion is that, because the murder conviction was based, at least in part, upon a felony-murder theory, *Wilder* applies to prohibit a conviction for the predicate felony as well. Accordingly, we vacate defendant's conviction and sentence on the CSC charge.

Affirmed in part and vacated in part.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra